BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

OCT 1998

In the matter of	)	
	)	
JAMES A. KAY, JR.	)	**WT Docket No. 94-147**
	)	
Licensee of one hundred fifty two Part 90 Licenses in the Los Angeles, California area	)	

To: The Commission

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

James A. Kay, Jr. ("Kay"), by his attorneys and pursuant to Section 1.106(h) of the Commission's Rules and Regulations, 47 C.F.R. § 1.106(h), hereby replies to the *Wireless Telecommunications Bureau's Opposition to Petition for Reconsideration* ("*Opposition*").

A. Procedural Issues

The Bureau, citing *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. den.* 383 U.S. 967 (1966), complains that Kay's request for reconsideration does not raise new issues. *Opposition* at ¶ 2. But in *WWIZ* the Commission did not address the procedural propriety of the petition for reconsideration, but rather its merits.[1] Kay respectfully submits that, fully consistent with *WWIZ*, he has demonstrated "manifest error or omissions so material that their corrections will result in substantial alteration of the original decision." 37 FCC at 686. In any event the suggestion that presenting new issues and arguments is a prerequisite to seeking reconsideration is absurd. The very word itself—**RE**consideration—means to consider **again**. Indeed, Section 405(a) of the Communications Act,

[1] In WWIZ, the Commission did not *dismiss* the petition for reconsideration on procedural grounds, but rather *denied* it on the merits.

ORIGINAL

which authorizes petitions for reconsideration, expressly excludes the consideration of new material except in specified circumstances.[2]

The Bureau's reliance on Section 1.106(b)(3) of the Rules is equally misplaced. That provision states: "A petition for reconsideration of an order denying an application for review which fails to rely on new facts or changed circumstances may be dismissed by the staff as repetitious." 47 C.F.R. § 1.196(b)(3). By restricting petitions for reconsideration of denials of an application for review, the regulations obviously allow other types of requests for reconsideration.

The Bureau makes a tortured attempt to bring the *Memorandum Opinion and Order* ("*MO&O*"), FCC 98-207 (released August 24, 1998) within the scope of Section 1.106(b) by mischaracterizing Kay's *Petition for Extraordinary Relief* as an application for review. The Bureau reasons that Kay's pleading 'was essentially a premature application for review of various interlocutory rulings of the Presiding Judge, as well as a petition for reconsideration of the Hearing Designation Order in this proceeding." *Opposition* at p. 2, n.1.

In the *Petition for Extraordinary Relief* Kay asks: (a) that the Commission—not a delegated authority—initiate an investigation into the manifest misconduct by the Bureau; *Petition for Extraordinary Relief* at § III.A.1, (b) that the Commission—not a delegated authority—*sua sponte* reconsider the designation order that had been adopted in the first instance by the Commission—not a delegated authority,[3] *id.* at § III.A.2; and (c) if it does not reconsider the designation order, that the Commission—not a delegated authority—stay the hearing pending

---

[2] Section 405 provides, in pertinent part: "[N]o evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission ... believes should have been taken in the original proceeding shall be taken on any reconsideration." 47 U.S.C. § 405(a)

[3] It is ironic that the Bureau frequently demurs to Kay's criticisms of the designation order on the grounds that it was adopted by the full Commission, but now characterizes Kay's challenge to the designation order as the equivalent of an application for review of delegated authority action.

investigation and resolution of Kay's charges against the Bureau, *id.* at § III.B.1. In the *MO&O* the Commission—not a delegated authority—denied all three of those requests for relief, and not one of them can be accurately characterized as a denial of an application for review.[4] Kay's request for reconsideration is procedurally proper

B. Due Process Issues

The Bureau relies on *Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055, 1074 (1st Cir. 1981), for the proposition that, under the Administrative Procedure Act, "notice need not be in the initial complaint," *Opposition* at p. 3, ¶ 4, and "that any deficiency in notice can be cured during the hearing." *Id.* at p. 4, ¶ 4. Even if the Bureau correctly reads *Soule Glass* as it applies to the NLRB's obligations under the Administrative Procedure Act, which Kay does not concede, the FCC's notice obligations are further defined by Section 312(c) of the Communications Act, which requires that the licensee be provided with a "a statement of the matters with respect to which the Commission is inquiring" in advance of hearing. 47 U.S.C. § 312(c).

The Bureau, on the other hand, with the assistance of a biased Presiding Judge, has successfully (and apparently with impunity) manipulated this proceeding so that the only thing even remotely approaching notice to Kay on many of the issues was given only after Kay was

[4] Only as a supplemental and alternative matter did Kay further request that, if the designation order were not reconsidered and if the hearing were not stayed, the Commission issue certain directives to the Presiding Judge regarding the conduct of the hearing. *Petition for Extraordinary Relief* at § III.B.2. This was not "a premature application for review" as the Bureau argues, *Opposition* at p. 2, n.1, but even if it were (a) it was only a portion of Kay's pleading, the bulk of which was clearly ***not*** in the nature of an application for review, and (b) Kay did not specifically address that aspect of the pleading in his request for reconsideration.

foreclosed from further discovery and shortly before hearing was to have commenced.[5] Prior to the close of discovery in this proceeding, for example, the Bureau refused to advise Kay of which stations were allegedly not timely constructed or deconstructed; when, where, how, and against whom Kay allegedly engaged in willful and malicious interference; the call signs or licensee names of authorizations Kay allegedly abused Commission processes in order to cancel; etc. In other words, as to most of the issues in this proceeding, the Bureau takes the absurd position that Constitutional, APA, and Communications Act notice requirements are satisfied if it simply cites a statute or regulation and then accuses Kay of violating it, without offering any specific factual allegations. One must wonder just what, if indeed anything, would qualify as insufficient notice under the Bureau's self-serving theory.

C. Abuse of Discovery and Prosecutorial Misconduct

As the Bureau correctly notes: "The Commission did not specifically address the use of discovery to obtain information from Kay . . . ." *Opposition* at p. 5, ¶ 6. This serves to highlight the inadequacy of the *MO&O*, the Commission's apparent willingness to turn a blind eye to the Bureau's abuse of process, and therefore the need for reconsideration.

"The use of discovery to ascertain whether grounds exist for enlargement of the issues would be difficult to limit and offers *substantial opportunity for abuse*. [Our policy goal is] to avoid unduly prolonging the hearing process by "fishing expeditions" into an applicant's every possible minor blemish . . . ." *Discovery Procedures*, 11 FCC 2d 185, 187 (1968); *see also Fox*

---

[5] In its *Statement of Readiness for Hearing*, submitted on June 3, 1998, the Bureau for the first time in the three and one-half years since designation, revealed in sketchy form some of the specific factual allegations underlying some of the designated issues. The Bureau's direct case exhibits, served on June 12, 1998, provided only slightly more enlightenment—and that came only a little more than two weeks before Kay was forced to submit his direct case exhibits in violation of Section 312(d) of the Communications Act. The Bureau conveniently manipulated these proceedings so that Kay was never given ***any*** notice, much less adequate notice, until he was precluded from further discovery and at such a late time that he was unable to use it in the preparation of his case.

Television Stations, Inc., 72 RR 2d 297 at ¶ 98 (Rev. Bd. 1993); *Priscilla L. Schwier*, 4 FCC Rcd 2659 (1989), *aff'd sub nom. New Life Evangelistic Center, Inc. v. FCC*, 895 F.2d 809 (D.C. Cir. 1990); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 634 (D.C. Cir. 1978). As the Review Board explained in *Metroplex Communications, Inc.*:

> Ordinarily, of course, discovery is not permitted unless a specific hearing issue is added upon the showing of a "significant and material" question of fact. *See, e.g., Phoenix Media Corp.*, 97 FCC 2d 916, 921 (Rev. Bd. 1984). This is "black letter" law; and, so far as we are aware, no exceptions to this general tenet exist. Discovery is not permitted routinely as a mechanism to produce, if possible, an issue not yet recognized. *Discovery Procedures*, 11 FCC 2d 185, 187 (1968); *see Liberty Television*, 14 RR 2d 71, 74-75 & n.8 (Rev. Bd. 1968); *see also Folkways Broadcasting Co., Inc.*, 33 FCC 2d 813, 816 n.16 (Rev. Bd. 1972) (discovery is not to be used as a "fishing expedition").

4 FCC Rcd 8149 at ¶ 13 n.11 (Rev. Bd. 1989). Clearly the Bureau's conduct is entirely improper and must be proscribed by the Commission—at a minimum the Commission must clearly acknowledge this issue and explain why the Bureau was being given carte blanche for a discovery fishing cruise that is so obviously at odds with consistent and long-standing precedent.

The Bureau attempts to excuse its abuse of discovery on the theory that "Kay's refusal to provide information relating to the allegations in the complaints resulted in adverse inferences being drawn with respect to those allegations." *Opposition* at p. 5, ¶ 6. This argument presumes, however, that the Bureau's only recourse against what it perceived as improper resistance by Kay was to arrange for an all-encompassing license revocation proceeding. The Bureau might have taken some intermediate steps, *e.g.*, having the Commission invoke its subpoena powers. *Cf.* 47 U.S.C. § 409(e). Had this been done, Kay would have had the opportunity to present to an independent judicial forum his concerns regarding the bona fides of the Bureau's intentions and the confidentiality of the information being sought. *Cf.* 47 U.S.C. § 409(f). At a minimum, the Bureau could have presented the matter of the outstanding requests for information from Kay to a higher level within the Commission but in a non-hearing context. Instead, Kay found himself one day being asked for competitively sensitive information by a mere Deputy Division Chief,

under circumstances which justified extreme suspicion and circumspection on Kay's part, and on the next day the subject of an order designating all of his licenses for revocation and from which he is prohibited from seeking pre-hearing reconsideration or review. In the context of that hearing, moreover, the Bureau consistently opposes and the Presiding Judge consistently blocks any attempts by Kay to inquire into and to demonstrate the justification for his pre-designation conduct

Moreover, the Bureau's argument is disingenuous. It implies that the Bureau received complaints, asked Kay for information, and then moved straight to hearing designation based on adverse inferences drawn from Kay's reluctance. But that is not what occurred. The Bureau continued to investigate. Commission employees were dispatched to Los Angeles on at least two different occasions to interview complainants, informants, and potential witnesses. Whether the Bureau would have been justified in relying solely on an adverse inference without any further investigation is not really a question before the Commission, because that is not what the Bureau did. The Bureau conducted further pre-designation investigation, and it was therefore incumbent upon the Bureau to exercise due care in that undertaking. With only a minimal amount of care, the Bureau would have discovered that many of the informants were in fact ***mis***-informing the Bureau about Kay. Not only did the Bureau fail to recognize easily discernible falsities in the information being fed to it, it appears that the Bureau itself was actively engaged in feeding its own false information to witnesses.

Had the Bureau acted in a proper manner and, in good faith, conducted its investigation in a competent and professional manner, it certainly would have learned that much of the information it had been given about Kay was false. Recognizing that this information came from Kay's enemies, the Bureau might then have softened its tone and position and been able to give Kay the comfort that would have enabled him to be of greater assistance in the Bureau's investigation. Instead, the Bureau abdicated its responsibility, and certain Bureau staff members

affirmatively engaged in misconduct to build a false case against Kay. For the Bureau now to claim that, even after all of that, it should be allowed to abuse the discovery process to further build its case—all the while refusing even to advise Kay precisely what that case consists of—is ludicrous.

At a minimum, and without conceding that this alone would adequately address Kay's due process concerns, the Commission must clarify that, in any hearing on this case, Kay be permitted to discover into and to present evidence at trial regarding the Bureau's pre-designation conduct insofar as it is relevant to justification for Kay's actions. If the Bureau has acted properly at all times, it has nothing to fear from simply allowing Kay to develop and present his defense. If, on the other hand, there is merit to Kay's charges, allowing him to be railroaded through an ill-conceived license revocation proceeding without even acknowledging, much less exploring, the Bureau's role, would be a gross and inexcusable miscarriage of justice.

A glaring indication of the Bureau's bad faith is that, nearly four years after designation of this proceeding, it has summarily dropped the issue accusing Kay of unlawfully trunking his conventional stations, citing as the basis for this belated action information that was in the Bureau's possession prior to designation. *See Petition for Reconsideration* at pp. 5-6. The Bureau's responds that this "ignores the fact that until depositions in this proceeding, Kay would not tell the Commission how his various stations were configured into trunked groups." *Opposition* at pp. 4-5, ¶ 5. This response is misleading and not to the point. Kay was not asked about specific trunk groups until his deposition. The Section 308(b) letter which gave rise to this proceeding seeks absolutely no information about the trunking of Kay's conventional stations.

On July 22, 1994, five months prior to the *HDO*, Kay fully cooperated in a field inspection of his facilities. It was the report from that inspection that the Bureau, when asked in discovery, cited as the grounds for its allegation that Kay's conventional stations had been unlawfully trunked. *Wireless Telecommunications Bureau's Response to Kay's First Set of*

Interrogatories (served on March 8, 1995) ("*WTB Interrogatory Responses*"), Response 2-7. The Bureau drops the issue, relying on an advisory letter, dated June 21, 1993, issued by Rosalind K. Allen, then Chief of the Rules Branch, Land Mobile and Microwave Division, Private Radio Bureau, in which a certain technical configuration of operating conventional stations in a quasi-trunked mode is approved as compliant with the rules. The Commission field inspectors—who were working closely with Bureau personnel—were aware of the advisory letter and knew or should have known from their inspection that Kay's stations were in conformity with it. Indeed, the two factors gleaned from that report. Indeed, two critical factors gleaned from the investigation, (a) the presence of periodic data bursts that were correctly identified as being a scheme used in E.F. Johnson LTR trunking format to update mobiles and to detect mobiles wishing to communicate with the system, and (b) the existence of a physical repeater network data link (RNDL) cable between this repeater and several others, are indications that Kay's stations were configured in conformance with the advisory letter. Yet it was these very factors that the Bureau, in its March 1995 interrogatory responses cited as the basis for the allegation of unlawful trunking against Kay.

Finally, the Bureau asks the Commission to keep swept under the rug the incontrovertible evidence that, in pursuing the case against Kay, (a) the Bureau relied on sworn statements of informants which it knew or should have known were false; and (b) in at least once instance, the Bureau itself was responsible for knowingly feeding the affiant false information to be included in a sworn statement. We are asked to ignore this gross and blatant prosecutorial misconduct simply because the Bureau does not intend to rely on the statements at hearing. This entirely misses the point. We have only the Bureau's word - which now has no credibility—that it is not also relying on other witnesses who gave false statements and will therefore seek to bring Kay down by perjuring themselves at hearing. The Pick and Lewis statements are an indication of the way the Bureau has gone about building its case, and Kay therefore should be permitted to

conduct discovery prior to trial and to cross-examine and present affirmative evidence at trial as to the Bureau's investigatory and prosecutorial methods and misconduct. They go to the heart of the credibility of the Bureau's case. Yet the Bureau opposes and the Presiding Judge bars any such inquiry on relevance grounds.

The documented and unrefuted[6] fact that the Bureau would engage in such blatantly unethical misconduct supports Kay's assertions of an animus toward Kay by certain members of the Bureau's staff. It is proof that Kay's cries of foul are not the mere futile rantings of a condemned man, but rather that something is indeed very much wrong in the Bureau's handling of this case.

Respectfully submitted October 13, 1998

JAMES A. KAY, JR.

By: /Robert J. Keller/ By: /Aaron P. Shainis/ /RJK

Robert J. Keller
Law Office of Robert J. Keller, P.C.
4200 Wisconsin Avenue, N.W.
Suite 106 – Box 233
Washington, D.C. 20016-2157

Telephone: 301-320-5355
Facsimile: 301-229-6875
Email: rjk@telcomlaw.com

Aaron P. Shainis
Shainis and Peltzman, L.L.P.
1901 L Street, N.W.
Suite 200
Washington, D.C. 20036-3506

Telephone: 202-293-0011
Facsimile: 202-293-0810

[6] In the *MO&O*, the Commission did not dispute that Mr. Hollingsworth, while a member of the Bureau staff, provided false information to Richard Lewis and then induced him to sign a false sworn statement against Kay. The Commission states that there is no indication the Bureau knew the Pick statement was "misleading". *MO&O* at ¶ 15. As Kay explained, the Pick statement was more than merely "misleading," it was blatantly false. Moreover, it is undeniable that, in the unlikely event the Bureau did not know of its falsity, the Bureau *should* have known. *Petition for Reconsideration* at pp. 9-10. The Bureau does not respond to this because, of course, there is no response.

CERTIFICATE OF SERVICE

I, Robert J. Keller, counsel for James A. Kay Jr., hereby certify that on this 13th day of October, 1998, I caused copies of the foregoing **PETITION FOR RECONSIDERATION** to served, by facsimile with follow-up by first class United States mail, postage prepaid, on the officials and parties in WT Docket No. 94-147, as follows:

JOHN I RIFFER ESQ
ADMINISTRATIVE LAW DIVISION
OFFICE OF GENERAL COUNSEL
FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET NW STE 622
WASHINGTON DC 20054-0001

JOHN SCHAUBLE ESQ
ENFORCEMENT DVISION
WIRELESS TELECOMMUNICAITONS BUREAU
FEDERAL COMMUNICATIONS COMMISSION
2025 M STREET NW STE 8308
WASHINGTON DC 20554-0002

WILLIAM H KNOWLES-KELLTT ESQ
GETTYSBURG OFFICE OF OPERATIONS
WIRELESS TELECOMMUNICAITONS BUREAU
FEDERAL COMMUNIATIONS COMMISSION
1270 FAIRFIELD RD
GETTYSBURG PA 17325-7245

/Robert J Keller

Robert J. Keller